Nov. 10, 1830. **The House of Lords accordingly 'ordered and adjudged that 'the Interlocutors complained of be affirmed.'**

Appellant's Authorities.—(*Bona Fides.*)—Dig. lib. 6. tit. 1. § 38; lib. 12. tit. 6. § 33; lib. 20. tit. 1. § 29; lib. 41. tit. 7. § 12; Grotius, lib. 2. c. 10. § 2; Pothier de Proprietè, p. 2. cap. 1. art. 6. § 343. 347; Leyser ad Pand; Spec. 447. vol. 7. p. 88; Vinnius, lib. 2. tit. 1. § 30. p. 157; Garsias de Melior, c. 14. § 10. fol. 309; 1 Müller voce Ædificatio, p. 127. § 5; Dig. lib. 12. tit. 6. § 33; Müller voce Retentio, 471. § 18. 478. § 73; Berger Economia Juris de Dominio, lib. 2. tit. 2. p. 216; 5 Voet. 3. 23; Garsias, c. 6. § 3. fol. 273; 1 Huber, p. 100; Franc Zypiæ Notitia Juris Belgicæ, vol. 2. p. 51. § 12; Pothier Traité Negot. Gest. § 1. art. 3. case 2. § 192; 1 Stair, 8. 6. 1; Bank. 9. 4; 3 Ersk. 1. 11: Kaimes's Pr. of Eq. b. 1. p. 1. § 2. art. 1; Binning, 18th Jan. 1676, (13401); Jack, 23d Feb. 1665, (3213); Halket, 24th Jan. 1762, (13412); Guthrie, 2d Feb. 1672, (10137); Halliday, 20th Feb. 1706, (13419); Rutherford, 28th Feb. 1782, (13422); Mackenzie, March 8, 1793, (13370); 2 Stair, 1. 40; Müller voce Posses. Mal. Fid. p. 540. § 8. and p. 524; Pothier de Proprieté, p. 2. c. 1. art. 5. § 3; 2 Ersk. 1. 25; Maxwell, 9th Feb. 1693, (1697); Grant, 9th Feb. 1765, (1760.)—(*Entail.*)—Müller Fid. Com. p. 161. § 4. 94 and 115; Garsias, p. 313; Berger, p. 312 and 372.

Respondents' Authorities.—(*Bona Fides.*)—Domat. 1. 81. p. 272.; Voet. ad Pand. lib. 6. tit. 1. § 36, 37, and 38; Vinnius ad Inst. lib. 2. tit. 1. § 30; Zoezius, lib. 41. tit. 1. § 58- 61, and 80.—(*Entail.*)—2 Stair, 1. 24; 2 Ersk. 1. 25; 1 Bank. 8. 12. and 2. 19. 25; Kames's Pr. of Eq. p. 114; Blair, Nov. 18, 1783, (1775); Cardross, Jan. 2, 1711, (1747); Bruce, July, 1822, in H. of L. (1 Shaw, 213.); Hodge, Feb. 13, 1664, (2651); Burns, Dec. 4, 1735, (13402); Dillon, Jan. 14, 1738, (15432); Webster, Dec. 7, 1791, (Bell's Cases v. Entail, No. 7.); Taylor, eo die, (Ibid. No. 8.); Campbell, Feb. 20, 1812, (F. C.); Tod, Jan. 14, 1823, (2 S. and D. No. 110. p. 113.) affirmed May 27, 1825. (Ante I. 217.) 10 Geo. III. c. 51.

J. CHALMER,—SPOTTISWOODE and ROBERTSON,—Solicitors.

No. 38. GEORGE PENTLAND, Appellant.—*Brougham—Romilly.*

LADY GWYDYR and Husband, Respondents.—*Lushington.*

Sale—Construction of the terms of a Contract of Sale.
Proof—Incompetent to control the terms of a written contract by an extrinsic document.

Nov. 12, 1830. **The Respondents, proprietors of the estate of Stobhall, in Perthshire, announced for sale, in autumn 1817, a wood on the estate called the wood of Strelitz, or Strelitz plantation. Under this name, two divisions were included, the one containing about 209 acres, and the other about 60 acres. They were separated from each other by a feal (turf) dyke, and a road. About six acres of the larger division were disposed of prior to January**

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1818, of which part was purchased by the appellant, Pentland. Nov. 12, 1830.
On the 13th of that month he addressed to the land-steward of the respondents this letter :

'Sir, Since I had the pleasure of seeing you at Stobhall on 'the 29th ult., when I purchased the few weedings of large trees, 'I have been considering your offer or proposal of purchase of 'the wood of Strelitz, and hereby make you the following offer 'for the same, viz. L.10 sterling per acre, and to be allowed six 'years to cut the wood, (as sales are but slow,) and payment to 'be made each December for the quantity cut during that sea- 'son ; or, if more agreeable to you, and to avoid all trouble on 'either side, I will give you L.2000 sterling for the whole lot, 'payable by bill at one or two years, a discount of five per cent 'being given me, allowing that sum to have been divided into 'six yearly payments, of course I being allowed my own time 'to cut down the wood,' &c.

No bargain was at this time concluded ; but Pentland having gone to London in March thereafter, had an interview on the subject with Mr Kennedy, the factor and commissioner for the respondents. That gentleman, after some communication with persons connected with the estate in Scotland, and after Pentland had left London, wrote to him on the 21st April this letter :—

'From the estimate of the quantity and size of the timber on 'the Strelitz plantations, it appears that the amount of such 'valuation, at the lowest average, would be L.2452, for which sum 'I now make you the offer of that wood, to be cut and paid for 'according to the agreements drawn out by us when you were 'in London last ; that is, the whole to be cleared off in three 'years from commencement of cutting. 2dly, To be paid by 'bills at six months, dividing the whole into six payments, of 'which the first payment to be paid in advance, and a bill given 'at six months for the next payment ; and the wood reserved to 'be deducted at payment of last bill. 3dly, The screen of wood 'not to be more than twenty-five Scots acres, nor less than fif- 'teen acres, and chosen by the proprietor or his agents. 4thly, 'A third of the whole plantation, or nearly so, to be cut and 'cleared yearly, and that in one part only. If this meets your 'intentions, you will let me know,' &c.

To this communication, Pentland, on the 30th, sent the following answer :

Nov. 12, 1830. 'I was favoured with yours of the 21st current, making me 'an offer of the timber on the Strelitz plantations at L.2452 'sterling. Although I have again perambulated them, I really 'think the sum is high; but I shall throw myself entirely into 'your hands; and when you consider that it is clearing you 'without further trouble, I hope both Mr Burrell and you will be 'disposed to give me an abatement, and make each payment of 'the six L.350 each, which would make L 2100. That I leave 'entirely to Mr Burrell's consideration and yours; for a per-'son taking off-hand such a bargain should have a little latitude, 'as there is considerable risk. Please receive inclosed a bank-'draft for L.350 sterling, payable to you, or order, which would 'be the first instalment of the price, if allowed to be L.2100; 'but if it must be more, I shall send it with the bill for the next 'instalment at six months, on commencing cutting, which I will 'do in a short time. I have informed Mr Fenwick, according 'to your orders, that I have accepted your offer, which I now 'do, leaving the above point to be disposed of as to yourselves 'seems meet; and I humbly hope it will be granted, as the buyer 'in such a transaction as this should have the cast of the baulk '(balance), as we say in Scotland, on his side, and which I have 'no doubt will be acceded to in this. Writing Mr Burrell, I 'have mentioned my being favoured with your letter and my 'acceptance, trusting to his goodness in giving this discount. 'And I am sure it must be agreeable to all parties that our 'valuations were so near one another on the whole. Your reply 'in the course of a few posts, as to my humble request, will 'oblige,' &c.

In reply, Mr Kennedy wrote on the 5th of May, that no deduction could be given, and stating that 'The persons who have 'measured the plantations and trees, Mr Duff and Mr P. M'Ar-'thur, will attend a meeting at the Strelitz wood, that they may 'point out the exact lines which they have sent up to me, in 'order, previously to cutting any timber, that the quantity may 'be ascertained, so as to form an average price for those acres 'we propose to reserve for shelter; write to Mr Fenwick to 'give directions accordingly; and I am,' &c.

After the screen or belt had been marked off, Pentland proceeded to cut the wood, and paid the five first instalments. He failed to complete the cutting within the stipulated time, and alleged that the screen or belt of wood belonged to him in property, subject only to a right of purchase in favour of the respond-

ents, and that the other division of the plantation was included in his purchase. This the respondents disputed, and presented a petition to the Sheriff of Perthshire, praying him to appoint inspectors to measure the screen or belt, so that the value of it in proportion to the rest of the wood might be ascertained; to ordain Pentland forthwith to complete the cutting; and to pay the last instalment, under deduction of the value of the screen or belt of wood. Pentland rested his defence on the ground above mentioned, and insisted that he was entitled to L.40 per acre for the belt, and to deduction of the value of the other division of the plantation, of which delivery was refused to him. On the other hand, the respondents maintained, 1. That the belt had never been sold to Pentland, but had been expressly reserved, subject to a declaration that he was to receive a deduction from the price corresponding to the quantity reserved, and at the rate which he had bought the wood, being about L.12 per acre; and, 2. That it was never intended to sell to him the smaller division of the plantation; and that accordingly he had attended the persons mentioned in the letter of 5th May, who had pointed out the wood actually sold, and which did not embrace that claimed. Nov. 12, 1830.

With reference to the first of these propositions, the respondents produced a document, written by their factor, Mr Kennedy, in London, but which was not dated nor subscribed. It was in these terms:

'Basis of agreement with Mr G. Pentland in London, and L. 'Kennedy:—Strelitz wood, Stobhall.—To be cleared in three 'years. To be paid by bills at six months, equally divided, or 'cash, the first in advance. The part reserved for screen to be 'deducted, in proportion to the measure, from the value of the 'whole. With Mr Geo. Pentland of Perth.'

They also founded on some correspondence between Mr Kennedy and certain persons in Scotland, which they alleged Pentland had seen, but which he denied, and of which no evidence was adduced. The Sheriff allowed the respondents a proof inter alia, that 'Duff and M'Arthur, or one of them, did attend 'at Strelitz wood with the defender, and what passed on that 'occasion as to pointing out the exact lines of the wood, which 'was contained in the defender's bargain, and as to the reserved 'screen.' The respondents accordingly adduced witnesses, who proved that Pentland was present when the screen or belt was marked off. After the leading witness had deponed, 'That he 'heard no conversation between the defender and any of those

Nov. 12, 1830. 'present relative to the defender's bargain,' he was asked, 'whether, upon the occasion of marking off the screen, the defender advanced any claim to the natural growing fir wood, 'and the old wood partly cut down, lying on the south side of 'what was marked off for the screen, and of the feal dyke running 'up the same. Objected to by the defender, because the witness has already deponed that he heard none of the conversation betwixt the parties in regard to the subject of this question. And the question being allowed and put, depones that 'he did not hear the defender make any such claim.'

The Sheriff found, 1st, That the above memorandum produced by the respondents must be held as the agreement alluded to in the letter of the 21st of April, 1818; and that the wood reserved for the screen must be deducted from the last payment, in proportion to the measure, from the value of the whole wood. And 2d, That it was proved, that the one division of the wood was separated from the other by a feal dyke; that the reserved screen of wood was marked off in presence of Pentland, and was bounded by the feal dyke: and that, under all the circumstances, Pentland must have known that the wood sold to him was the wood included within the reserved screen, and did not include the wood beyond it: That the value of the reserved screen, at the rate at which Pentland had purchased, was L.210; and, under deduction of that sum, decerned for the last instalment.

Pentland then brought an advocation and an action of declarator, in the Court of Session, to have it found that he was entitled to the division of the plantation, besides that of which he had got possession; and that the screen or belt had been sold to him, and therefore must be repurchased by the respondents. The Lord Ordinary in the advocation remitted simpliciter, and in the declarator assoilzied; and to this judgment the Court adhered, on the 23d of May, 1826.*

Pentland appealed.

Appellant.—The judgments are incompetent, as the matter of fact ought to have been sent for decision by a Jury. Supposing, however, that it were competent for the Court of Session to decide the matter of fact, the judgments rest on evidence totally inadmissible. 1st, It is a settled rule that where a bargain is completed in writing, no extrinsic evidence can be received to control the terms of the written bargain.

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* 4 Shaw and Dunlop, Appendix.

But the document denominated 'basis of agreement,' was admitted as evidence to control the terms of the interchanged missives, although it was a latent writing which remained in the hands of the respondents' factor, and was never communicated to the appellant. 2d, The parole evidence was also inadmissible, and particularly the question put to the witness in regard to the import of a conversation which he had previously sworn he had not heard. Nov. 12, 1830.

Respondents. It was not incompetent for the Court of Session to decide the matter of fact. They might, no doubt, if they had thought fit, have sent it for trial to a Jury; but this was entirely optional. Besides, the appellant did not ask the Court to remit the case to a Jury. In regard to the evidence objected to, it was plain, 1st, That the memorandum was admissible, because an agreement was referred to in the missives, and it was not pretended by the appellant that there was any other document constituting the agreement except that memorandum. And, 2d, The question put to the witness was unimportant; because, independent of it, there is ample real evidence to support the judgments.

LORD WYNFORD.—The extent of the wood was a question of fact, and was fit for a trial by Jury; but the parties did not ask to have it sent to the Jury Court, but submitted it to the decision of the Court of Session. I think that, after the Court of Session have decided the case—and, as I think, rightly decided it—your Lordships ought not now to direct it to be tried by a Jury. But it has been objected that papers were read in evidence which ought not to have been admitted, and questions put to a witness which ought not to have been permitted to be put. I am of opinion that the paper found in London was not evidence. If this case had been tried by a Jury, and that paper had been given in evidence, I should have recommended your Lordships to direct a new trial, because we should have had no means of knowing whether the verdict of the Jury had not passed on that paper, which ought not to have been in evidence. But we know that that paper had no effect on the Court of Session, for the Judges of that Court have said that they paid no attention to it; and I think that there is evidence enough to support the judgment of the Court of Session, without considering the contents of the objectionable paper. [The rest of Lord Wynford's observations were addressed to matters of fact, and to the construction of the contract of sale. From the observations on the contract no general rule can be deduced, and they are therefore not reported.] His Lordship moved that the appeal be dismissed, with L.100 costs.

The House of Lords accordingly ordered and adjudged that

Nov. 12, 1830. the Interlocutors complained of be affirmed, with L.100 costs.

MEGGISON and POOLE,—SPOTTISWOODE and ROBERTSON,—Solicitors.

No. 39. MRS MEAD or MACKENZIE and Husband, Appellants.—*Brougham—Knight.*

WILLIAM ANDERSON, Respondent.—*Spankie—Robertson.*

Heritable or Movable.—Where a party sold heritable subjects by missives, and the price, payable at a future period, was declared a burden on the subjects: Held (affirming the judgment of the Court of Session) that the price was heritable, and not carried by an English testament.

Nov. 16, 1830.

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THE late Henry Anderson, who resided in England, was one of several pro indiviso proprietors of certain heritable subjects situated in Broughton, immediately adjacent to Edinburgh. In virtue of a power of attorney granted by him and certain other of the proprietors to Mr Thomas Baillie, W. S., that gentleman sold to Mr James Pedie, W.S., on the 2d of November, 1822, by missive letters, their shares of the property, at the price of L.2700. In the offer by Mr Pedie it was stipulated that the price should be 'payable as follows, viz. two-thirds thereof two 'years after Whitsunday next, which is to be my term of entry 'to the premises, and to bear interest from said term of Whit-'sunday 1823 at four per cent, and to remain a burden over the 'property until paid, and the remaining third part of it to be 'payable at Whitsunday next.' In October, 1823, Mr Anderson died, at which time no farther title had been granted to Mr Pedie. Mr Anderson left a will, in the English form, dated in 1819, in favour of his niece, the appellant, Mrs Mead or Mackenzie. The disposing clause was in these terms: 'I give, 'devise, and bequeathe, all, and every, my freehold estates in 'England, or elsewhere,' and in general his whole property and effects, wherever situated. His brother, the respondent, William Anderson, was his heir at law. A competition then took place between these parties in regard to that part of the price which had been declared a burden on the property, and remained in that situation at the death of Mr Henry Anderson—the appellants contending that it was to be regarded as movable, and so carried by the will, while Mr Anderson maintained